

1 UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF NEW JERSEY

3  
4 IN RE: VALSARTAN PRODUCTS  
5 LIABILITY LITIGATION

CIVIL ACTION NUMBER:

19-md-02875

6 CASE MANAGEMENT CONFERENCE  
Via Zoom Videoconference

7 Mitchell H. Cohen Building & U.S. Courthouse  
8 4th & Cooper Streets  
Camden, New Jersey 08101  
9 May 17, 2023  
Commencing at 4:00 p.m.

10 B E F O R E: THE HONORABLE THOMAS I. VANASKIE (RET.)  
11 UNITED STATES SPECIAL MASTER

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4 Larry MacStravic, Courtroom Deputy  
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1 (PROCEEDINGS held via Zoom Videoconference before  
2 The Honorable Thomas I. Vanaskie (Ret.), United States Special  
3 Master, at 4:00 p.m.)

4 JUDGE VANASKIE: Is everybody on that needs to be on?  
5 I'm assuming so.

6 We are going to hear presentations with respect to  
7 some matters that are in issue here. I am going to follow the  
8 agenda letter submitted by plaintiffs, the agenda letter of May  
9 15th, and then we will switch to the letter of the same date,  
10 and it's Document 2377 in the ECF system, from Victoria Lockard  
11 on the defense side.

12 MR. SLATER: Your Honor, one request, Your Honor. I  
13 don't have the letter in front of me and I don't know if it's  
14 the first issue, the class notice issue, that had to be  
15 discussed. Behram Parekh, who's going to argue for us, I think  
16 has another hearing in a little while so we were going to  
17 request, because he only has about 25 or 30 minutes, if  
18 convenient for Your Honor, we were hoping we could do that  
19 issue first only because he's the one to argue it and he has  
20 two hearings at the same time.

21 JUDGE VANASKIE: It looks like he is standing outside  
22 the courthouse right now. So I think we should let him go  
23 first.

24 MR. SLATER: Thank you so much.

25 MR. PAREKH: Thank you for accommodating me.

1 JUDGE VANASKIE: All right.

2 MR. PAREKH: I believe actually the issues raised are  
3 by defendants and we responded to them. So I don't know  
4 whether you want to hear from them first or from us first.

5 JUDGE VANASKIE: Who will be addressing this issue for  
6 the defense?

7 MR. OSTFELD: Your Honor, this is Greg Ostfeld. I  
8 will be addressing it for the defense.

9 JUDGE VANASKIE: All right. Do you want to go first,  
10 Mr. Ostfeld?

11 MR. OSTFELD: Certainly, Your Honor. I'll be  
12 addressing issues from the standpoint of the manufacturer  
13 defendants. I see Kara Kapke is on. She's also raised some  
14 issues on behalf of the pharmacy defendants, so she may also  
15 want to chime in after I do.

16 JUDGE VANASKIE: All right.

17 MR. OSTFELD: So Your Honor, we're seeking some basic  
18 discovery in connection with plaintiffs' Class Notice Program  
19 which we believe is needed to evaluate whether the Class Notice  
20 Program satisfies Rule 23(c)(2)(B)'s requirements of the best  
21 notice practicable and individual notice to all class members  
22 identifiable through reasonable effort.

23 We're also going to seek a short extension of the  
24 opposition deadline to allow that discovery to proceed and to  
25 allow us to properly evaluate this and to obtain some

1 additional materials the plaintiffs have agreed to provide but  
2 that aren't ready yet that really should have been part of the  
3 original notice plan.

4           So I would like to begin just by briefly explaining  
5 why we need this discovery, which is to assess whether  
6 plaintiffs have satisfied their burden of proof under 23(c),  
7 that the Class Notice Plan provides adequate notice to the  
8 absent class members. As Your Honor likely knows, the Third  
9 Circuit is stringent in enforcing 23(c)(2)(B)'s requirements  
10 and, in particular, the individual notice requirement.

11           Plaintiffs' notice plan is notable in that it departs  
12 from the methods to identify the class members that were  
13 described by their ascertainability expert, Laura Craft. Ms.  
14 Craft had proposed using detailed transactional records from  
15 pharmacies and from pharmacy benefit managers to identify the  
16 TPP and consumer class members and if that had been done here,  
17 we could then presumably proceed with individual notice to  
18 those class members, but plaintiffs' notice plan doesn't use  
19 those methods.

20           What they are proposing instead for the third-party  
21 payor class, the TPP class, they're proposing individual notice  
22 but they propose doing it using a proprietary mailing list from  
23 a class administrator that they've hired; and then for the  
24 consumer and medical monitoring classes, what they are  
25 proposing is not individual notice at all but a digital

1 advertising campaign that targets hypertensive patients.

2           So deviating from the ascertainability evidence is not  
3 necessarily fatal to plaintiffs' notice plan, but,  
4 respectfully, it does raise serious questions because Third  
5 Circuit precedent is clear that one purpose of the  
6 ascertainability requirement is to protect absent class members  
7 by facilitating the best notice practicable.

8           So because plaintiffs have proposed something  
9 different from what they proposed at the class certification  
10 stage, and what has already been explored through discovery, we  
11 simply need a fair opportunity to take discovery on this new  
12 and previously undisclosed methodology to give notice to class  
13 members.

14           And what do we need here? So we listed ten items in  
15 our May 11th letter, which is Exhibit A to the defendants'  
16 letter, but it really falls into three buckets.

17           The first bucket relates to the TPP notice plan, and  
18 what we really need there -- we needed there was a copy of the  
19 mailing list and the email list and plaintiffs have provided  
20 that. Now that we've seen it, it raises a number of questions  
21 because it consists, as far as we can tell, largely of entities  
22 that are not part of the class; pharmacies and drugstores and  
23 employees of pharmacies and drugstores which are not part of  
24 the class. So we do think we need an opportunity to question  
25 the administrator about this list. We also, respectfully, need

1 to show this mailing list to our own experts. The list was  
2 produced "Attorneys' Eyes Only" and we're going to request  
3 either plaintiffs' consent or leave of the Court to share this  
4 list with our expert who has seen and who has signed onto the  
5 protective order. That's one of our buckets of discovery.

6 The second pertains to the individual advertising  
7 campaign. And what plaintiffs have done here is they've  
8 provided a declaration from their class administrator, Steven  
9 Weisbrot, who was not an expert during the class certification  
10 stage. We haven't had an opportunity to depose him previously.  
11 His declaration is pretty technical regarding the digital  
12 advertising campaign, but it's a little sparse on the details.  
13 It lists tactics and tools but it doesn't describe in any  
14 detail what they are, how they're used, how they would be  
15 implemented. Mr. Weisbrot provides reach and frequency  
16 statistics that are intended to demonstrate adequacy, but he  
17 doesn't explain how they're calculated.

18 And really, basically, this entire bucket of requests  
19 can be satisfied -- and I'm referring here to Requests 3  
20 through 8 and 10 from our letter -- we could satisfy all of  
21 these by taking Mr. Weisbrot's deposition which plaintiffs are  
22 not prepared to do. They are willing to make him available for  
23 an informal discussion, which we've scheduled for next Tuesday,  
24 and we're certainly willing to have that discussion but,  
25 respectfully, it's not sufficient. We need more than an



1 informal discussion because a discussion isn't evidence. It's  
2 not testimony under oath, so we can't use it to present  
3 concerns we have to Judge Kugler in our opposition brief. This  
4 is a very different scenario from the discussions referenced in  
5 plaintiffs' letter regarding the use of technology-assisted  
6 review and informal discussions with those experts, that was an  
7 effort to reach compromise on document collection issues in  
8 connection with eDiscovery. Here, we have a part of the class  
9 certification process, an important part. We are dealing with  
10 the phase of class notice which is governed by specific proofs  
11 that are required by 23(c)(2)(B). So it's a matter for  
12 evidence and not just informal discussion. Again, we're happy  
13 to have that discussion, it could effectively narrow what we  
14 need to cover at deposition, but we think we're also going to  
15 need to have a deposition to learn and to develop evidence on  
16 what this digital campaign does so that we can determine  
17 whether or not it's sufficient to satisfy the individual notice  
18 requirement of the Rule 23(c) even though it doesn't encompass  
19 individual notice.

20 JUDGE VANASKIE: Well, excuse me, let me ask you a  
21 question: Why not make that determination on the need for the  
22 deposition of this expert, Mr. Weisbrot, to be made after you  
23 have this sit-down and chat and see what you can reach  
24 agreement on, and you can confer with your experts then based  
25 upon information that he's provided?

1 MR. OSTFELD: Under ordinary circumstances,  
2 Your Honor, that's exactly what I would love to do and it's  
3 what we proposed to plaintiffs. We proposed that as well as  
4 our third bucket of items, which is the contents of their  
5 website and toll-free number. The problem, Your Honor, is that  
6 our opposition to the Class Notice Plan is due a week from  
7 today. We are not going to interview Mr. Weisbrot until the  
8 day before it's due. And what plaintiffs proposed -- what we  
9 did, Your Honor, is we asked to go back to what was an agreed  
10 schedule that we both proposed jointly to Judge Kugler, which  
11 is that our opposition would be due June 7th and their reply  
12 would be due June 28th. Plaintiffs had also proposed a shorter  
13 schedule, which is the one Judge Kugler adopted, which has our  
14 opposition due May 24th. We said to plaintiffs, look, there's  
15 a lot going on here, there's a lot we need to know, why don't  
16 we go back, why don't we propose to the Court that we go back  
17 to the first schedule and they said no. They said, we really  
18 want to get this in front of Judge Kugler at the next case  
19 management conference, which is on June 7th, so we're willing  
20 to agree to two extra days, to extend it to May 26, but we're  
21 not willing to agree to more than that.

22 So, Your Honor, respectfully, talking to Mr. Weisbrot  
23 on Tuesday and then having a response due on Friday just  
24 doesn't give us the time we need to do what Your Honor is  
25 suggesting, which is to have a deposition -- or to decide on a

1 deposition after we've spoken with him. If we can agree to the  
2 extension, then I'm fine with that approach. We can speak with  
3 Mr. Weisbrot and then we can decide if there needs to be a  
4 deposition. We'd still like guidance from Your Honor as to  
5 whether that deposition would go forward if we decide we need  
6 it, because I don't think we'll be back in front of Your Honor  
7 before our response deadline, even under the extended deadline,  
8 but that would provide some breathing room to have those kinds  
9 of discussions.

10           The third thing we need, Your Honor, are the contents  
11 of the website and the scripts of the toll-free number. And  
12 that's basic stuff. That should have been part of the original  
13 Class Notice Plan. What is going to be told to the class  
14 members is an essential part of the Class Notice Plan. We need  
15 to know what's going to be said, in what language, both on the  
16 website and on the toll-free number. They've also proposed  
17 they're going to use the website to collect data from class  
18 members. We need to know what data are going to be collected  
19 and how and what the process looks like and where it goes and  
20 what's done with it. These are all part of the process. And  
21 that's basic information that can, should and must be provided  
22 to us. I think plaintiffs acknowledge that. They say they are  
23 going to give it to us; the problem is it's not ready yet. And  
24 that's fine but again, it goes to the timeliness issue. They  
25 can't even commit that it will be ready before our deadline,

1 our current deadline of May 24th, which means we may not have a  
2 chance to evaluate it at all before we have to file our  
3 opposition papers. So it's all fine, I'm not suggesting that  
4 their Class Notice Plan needs to be stricken but it's not  
5 complete until they provide that information.

6 So what needs to happen is they need to be given a  
7 date certain to do that. We then need to have an extended  
8 deadline that accommodates the fact that they needed more time  
9 to prepare the elements of their Class Notice Plan. And then  
10 we can have a reasonable, rational approach to develop the  
11 class notice briefing and to put it in front of Judge Kugler in  
12 the ordinary course, not on a rushed basis. There's millions  
13 of class members here in a lawsuit where plaintiffs' own  
14 damages expert has calculated a multibillion dollar price tag.  
15 These claims belong to the class members. They're entitled to  
16 proper notice, they're entitled to an opportunity to opt out,  
17 they need to have a good notice plan for that to happen and  
18 because this notice plan doesn't follow their ascertainability  
19 methods, there really needs to be a full and fair opportunity  
20 to explore it. That's all we're seeking.

21 JUDGE VANASKIE: All right. Mr. Parekh.

22 MR. PAREKH: Sure, Your Honor.

23 We have provided Mr. Ostfeld with some of the data  
24 that he's requesting. We've also committed to provide him in  
25 the next day or two with a mockup of the website, and we did

1 provide, with the original notice, the long-form notice, which  
2 contained virtually all of the information that the website  
3 would have, the website would just be more detailed and  
4 presented in a different manner. So it's more of a manner  
5 rather than a content issue.

6 In terms of the questions that Mr. Ostfeld has, a lot  
7 of his questions are basic questions of what does this  
8 marketing term mean rather than a question of -- you know, a  
9 substantive question as to where or how adequate this notice  
10 is. And if Mr. Ostfeld doesn't know the meaning of the  
11 marketing term, that's not really our issue. I mean, you could  
12 Google those marketing terms, they have meanings, they are sort  
13 of industry standard meanings; but we also have offered and  
14 they have accepted to interview Mr. Weisbrot and be able to  
15 answer those questions for him informally. This is exactly the  
16 same type of situation that we had when we were dealing with  
17 the 30(b)(6) notices regarding ESI and sources of the ESI. We  
18 certainly could have insisted on a 30(b)(6) depo and then said,  
19 you know, we need to be able to use that in order to make our  
20 discovery motions. We didn't. We accepted the informal offer  
21 and it works out.

22 In terms of the scheduling, this is the schedule that  
23 Judge Kugler ordered and we think that, you know, it's a  
24 reasonable schedule. It's ultimately Judge Kugler's decision,  
25 not defendant's position, as to whether or not notice is

1 adequate, and we think putting all of this in front of Judge  
2 Kugler before the June 7th CMC would allow him to -- whether or  
3 not he makes a decision on that day -- at least let us know  
4 what additional information he may want or what his concerns  
5 are and then we can address those concerns. It's a Court  
6 determination. And really in terms of notice from defendants'  
7 standpoint, you know, they don't really have a -- it's not  
8 really a standing issue but the question of notice really comes  
9 down to is the Court meeting due process, not whether or not  
10 plaintiff or defendant is really in the right.

11 In terms of the other issues that Mr. Ostfeld has  
12 covered, we did provide the TPP information to him already and  
13 what we said was, if you believe that the TPP information is  
14 underrepresented or wrong in any way, please come back and tell  
15 us and we are happy to include anybody that you in your, in  
16 defendants' knowledge should be noticed and we'll include those  
17 people in the notice. And we've asked for that information and  
18 they're welcome to provide it and we'll provide individual  
19 notice to those people. We're not saying we won't.

20 The issue with delaying everything, one, it really is  
21 Judge Kugler's decision in terms of whether or not he wants to  
22 change the schedule; but the other issue is that if we delay it  
23 past the June 7th CMC, then we're basically 30 days out before  
24 we get to see Judge Kugler again. And we think that all of  
25 that is then pushing the trial date further and further out,

1 and Judge Kugler certainly doesn't want to do that.

2 We believe that the information we provided in the  
3 original motion and declaration is sufficient. We understand  
4 the defendants want more information, we're providing it to  
5 them, but we don't see why notice is particularly a complicated  
6 issue here and we think that they should be able to brief it by  
7 next Friday.

8 JUDGE VANASKIE: All right. Mr. Ostfeld.

9 MR. OSTFELD: Just a few quick points, Your Honor.

10 I certainly agree that Judge Kugler ultimately will  
11 make the decision whether or not the schedule will be changed.  
12 I think Judge Kugler greatly respects Your Honor's input on  
13 these issues and if Your Honor says that there are discovery  
14 issues and there needs to be additional time, I think Judge  
15 Kugler is likely to give attention to Your Honor's  
16 recommendations on that, and I would even go so far as to say I  
17 think he's likely to accept your recommendations. So I do  
18 think the recommendation would be appropriate here.

19 With respect to the sufficiency of the information, it  
20 comes back to the same problem. Rule 23(c)(2)(B) is quite  
21 clear: Individual notice must be given where the individuals  
22 can reasonably be identified. The plaintiffs themselves  
23 submitted an ascertainability expert who identified how they  
24 believed the individuals could be ascertained and identified  
25 and individually notified. They have now come out with a

1 notice plan that doesn't do that. It is our obligation -- it  
2 is incumbent on both sides and, frankly, it is independently  
3 incumbent upon the Court to make sure the due process rights of  
4 the class members are protected. That requires careful  
5 evaluation of a plan that deviates from the ascertainability  
6 plan and it requires very careful evaluation of a plan that  
7 proposes to use entirely technological means to purportedly  
8 reach members of the class, not even members of the class,  
9 members of a hypertensive population that may or may not mirror  
10 the requirements of the class. This is not something that has  
11 ever been proposed before; we had no knowledge that there was  
12 going to be an effort at a digital advertising campaign until  
13 we saw the Class Notice Plan. That was the first we heard that  
14 there wouldn't be an attempt at individual notice to the  
15 identified class members. It requires evaluation. The Court  
16 owes these class members their due process. And if it requires  
17 pushing back consideration of the Class Notice Plan by a month,  
18 I do not think that is too high a price to pay for due process.  
19 Due process does not come with a stopwatch. There needs to be  
20 a full and fair opportunity to vet this plan, which there has  
21 not been.

22 JUDGE VANASKIE: All right.

23 MR. PAREKH: Your Honor, what Mr. Ostfeld just said  
24 are basically their arguments opposing our plan. He just laid  
25 out for you why they think our plan is inadequate. I don't see



1 why that can't be briefed by next Friday, given the fact that  
2 he laid all those things out for you today. And if Judge  
3 Kugler agrees with him, then we will go back to the drawing  
4 board and redo our plan. If Judge Kugler disagrees with him,  
5 and thinks that our plan and the information we provided is  
6 adequate, then we go forward that way. But what he's saying is  
7 we think your information is inadequate, we want more  
8 information, but we don't want to actually brief that issue  
9 until we get all of this additional information and then we're  
10 going to still say your plan is inadequate.

11 JUDGE VANASKIE: All right.

12 MR. OSTFELD: What I'm saying, Your Honor, is we are  
13 entitled to explore the adequacy of this plan before we have to  
14 brief it. There are certainly elements of this plan that I  
15 find troubling but we have had no discovery into this plan yet  
16 and we are entitled to take that. We have the sketchy details  
17 of a plan; we don't have the contents of the website. There's  
18 a lot that has to happen here in order for Judge Kugler to make  
19 an informed decision about the adequacy of class notice. It is  
20 incumbent upon us to take the discovery to identify those  
21 issues and put them in front of the judge. That is why we have  
22 an adversarial process.

23 JUDGE VANASKIE: What are the ground rules,  
24 Mr. Parekh, for the interview of Mr. Weisbrot?

25 MR. PAREKH: We've provided Mr. Weisbrot -- we haven't

1 set any ground rules. They are welcome to ask him whatever  
2 questions they want. He is available for I think three and a  
3 half hours is what we've set aside. And, you know, if we think  
4 that there is something that they are delving into that is  
5 completely inappropriate, maybe we will raise that issue but we  
6 haven't set any preconditions or ground rules.

7 JUDGE VANASKIE: All right. Does anyone else want to  
8 be heard on this issue?

9 (No response).

10 JUDGE VANASKIE: All right. I am not going to suggest  
11 to Judge Kugler that the schedule be adjusted to enable you to  
12 pursue discovery on the questions that you've raised. You will  
13 have, I think, a fair opportunity to interview Mr. Weisbrot;  
14 you can raise your questions then. Attorneys are very good at  
15 submitting declarations, so you can submit a declaration with  
16 respect to what you learn during that interview. And if you  
17 feel that you have not had an adequate exploration of the  
18 issues surrounding notice, then you can raise that in your  
19 papers that you file with Judge Kugler and oppose the notice  
20 that's suggested by plaintiffs at that time. But I am not  
21 going to adjust the schedule to allow for additional formal  
22 discovery.

23 All right.

24 MR. OSTFELD: Understood, Your Honor. May we share  
25 the mailing list with our experts?

1 MR. PAREKH: We don't have an objection to that as  
2 long as you identify the expert.

3 MR. OSTFELD: Understood.

4 JUDGE VANASKIE: All right. So you identify the  
5 expert, you can certainly share the mailing list with your  
6 expert.

7 MR. PAREKH: What I meant is, we need to be able to  
8 know who that expert is in order to determine whether or not  
9 there's a conflict before that list is shared. I apologize if  
10 I wasn't clear.

11 JUDGE VANASKIE: Oh, for purposes of making a conflict  
12 determination?

13 MR. PAREKH: Correct, Your Honor, because it's a  
14 proprietary mailing list by a particular notice expert and if  
15 it's another notice expert that he believes, you know, is  
16 competing against him in the same field, there may be an issue.  
17 We hope not but we do at least want to have the ability to run  
18 that by. And if there is an issue, you know, may we just come  
19 back to Your Honor through an informal phone call or something?

20 JUDGE VANASKIE: Yes. I wanted to mention that. You  
21 know, you don't have to wait until the next scheduled discovery  
22 conference to raise an issue with me. I think we set that  
23 precedent a long time ago that if something comes up that  
24 requires a decision on a discovery matter, raise it with me by  
25 way of a letter and I'll promptly schedule a conference call

1 and so you don't have to wait until the next discovery  
2 conference.

3 But yes, Mr. Ostfeld, please provide the name of your  
4 expert or names of your experts and you can certainly disclose  
5 the mailing list to your expert upon confirmation that there is  
6 no conflict and no objection from plaintiffs. All right?

7 MR. OSTFELD: All right. And then, Your Honor, for my  
8 own planning purposes, is my response deadline the CMO 32  
9 deadline of May 24 or the May 26 deadline that plaintiffs  
10 indicated they were providing along with the interview of Mr.  
11 Weisbrot?

12 JUDGE VANASKIE: You'll have until May 26th, two  
13 additional days. If we need to put an order on the record,  
14 please submit the proposed order to me and we will promptly see  
15 that it gets docketed. Okay?

16 MR. OSTFELD: Thank you, Your Honor.

17 JUDGE VANASKIE: All right.

18 MR. PAREKH: Thank you, Your Honor. I need to get off  
19 the phone, so I apologize.

20 JUDGE VANASKIE: Understood. Thank you.

21 All right. So we will move back now to the  
22 plaintiffs' letter.

23 I did want to address one question, one matter on the  
24 first page of that submission, the May 15th submission, and  
25 that is the redactions with respect to Exhibit CC, ECF 1189,

1 that's the report that was done in Europe with respect to this  
2 matter. And you're entitled to a decision on that. You know,  
3 I issued rulings from the bench and memorialized them in an  
4 order that went out some time ago and I would propose in this  
5 instance, unless there's objection, because I have written  
6 quite a lot on this issue of confidentiality and the access to  
7 court records, I would simply issue an order that identifies  
8 those parts of Exhibit CC I believe should remain redacted and  
9 those parts that should not. And I am kind of jumping around  
10 here but the point is that we held argument and I gave the  
11 defense the opportunity to again submit another round of  
12 redactions to Exhibit CC, which they did. I had reviewed the  
13 initial round. I haven't given you my ruling on this new  
14 round, even though it's somewhat old now, this old new round,  
15 but I would propose simply to issue an order that identifies  
16 those parts that should remain redacted, those parts that  
17 should not, without saying much more than that. And if I do it  
18 that way, I will have something out this week to you on that.

19 Any objection to proceeding that way. On behalf of  
20 the plaintiffs, I'm sure not. But on behalf of the defense?

21 (No response).

22 JUDGE VANASKIE: You can always raise the objection  
23 after the order comes out but this way we'll expedite it. All  
24 right?

25 Now, Mr. Slater, you raised the issue with respect to

1 briefing schedule on sealing. This was all part of that issue.

2 MR. SLATER: Yes, Your Honor. I think that's going to  
3 be handled by Mr. Geddis for the plaintiffs.

4 JUDGE VANASKIE: All right. Is there anything really  
5 in dispute here, Mr. Geddis?

6 MR. GEDDIS: Are we talking about the deadline for the  
7 briefing?

8 JUDGE VANASKIE: Yes.

9 MR. GEDDIS: No, Your Honor. I think defense just  
10 wanted until June 15th and then we wanted until July 10th.

11 JUDGE VANASKIE: Right. If there is no objection, we  
12 will issue an order that sets those deadlines. All right?

13 MR. GEDDIS: Thank you, Your Honor.

14 MR. HARKINS: Thank you, Your Honor.

15 JUDGE VANASKIE: Okay, thanks.

16 I am not sure how much we can cover on this today but  
17 the next issue on the plaintiffs' agenda letter is the  
18 propriety of MSP's discovery responses. And a lot has been  
19 said on this. And who's addressing this issue for the  
20 plaintiffs?

21 MR. SLATER: I think that myself and Mr. Kass will be  
22 addressing this, depending on how the argument goes.

23 JUDGE VANASKIE: All right.

24 MR. OSTFELD: Your Honor, Greg Ostfeld. I will be  
25 addressing it for the defendants. I think this is another

1 situation where we've raised the issue.

2 JUDGE VANASKIE: Yes.

3 MR. OSTFELD: If you would like --

4 JUDGE VANASKIE: Well, the question I had for you, Mr.  
5 Ostfeld, is, is this ready for any kind of determination or are  
6 you proposing additional briefing or where does it stand?

7 MR. OSTFELD: So I think the discovery issue, the  
8 underlying discovery issue can probably be presented today. I  
9 think the question raised by the motion for order to show cause  
10 is probably not properly before Your Honor today. I imagine  
11 plaintiffs will want an opportunity to brief that. But I  
12 certainly think the discovery issues can be raised today and  
13 are somewhat time sensitive because, again, they relate to a  
14 pending deadline, which is our June 7th deadline for damages  
15 expert reports.

16 JUDGE VANASKIE: All right. Well, let's hear then  
17 your position with respect to the underlying discovery issue.

18 MR. SLATER: I will defer to Mr. Kass on this. I was  
19 prepared to handle the part about the motion that got filed  
20 yesterday, which I want do to address, but we might as well hit  
21 the part that's in the letter first, the substantive discovery  
22 issue, and that's for Mr. Kass.

23 MR. OSTFELD: Your Honor, from defense perspective,  
24 what we're asking you to do is simply to enforce what  
25 Your Honor already ordered in Special Master Order 73, which we

1 respectfully submit MSPRC has violated by failing to produce  
2 most of the records and datasets in its possession, custody, or  
3 control reflecting the subsidies, reimbursements, and rebates  
4 its assignors received from CMS, the Center for Medicare and  
5 Medicaid Services, during the time period for which MSPRC is  
6 seeking damages. We're also seeking a corresponding extension  
7 of our damages expert disclosure deadline to offset the  
8 prejudice caused by the withholding of those documents.

9           To refresh your memory on why this is relevant, you  
10 probably remember vividly the lengthy argument on October 27th  
11 where we addressed this issue, and, specifically, the TPP  
12 defendants' Request Number 2 which sought subsidy reimbursement  
13 and rebate data. We tried to be really transparent about what  
14 we were seeking when we filed that motion to compel and argued  
15 it before Your Honor on October 27th. We listed 14 specific  
16 reports and datasets that are submitted to CMS and that pertain  
17 to the reimbursement, subsidy, and rebate data that we need.  
18 And there's no mystery where this list came from, Your Honor.  
19 These reports and datasets are the ones that our damages  
20 experts said they needed in order to evaluate plaintiffs'  
21 damages theory as pertains to Medicare Advantage organizations  
22 and Part B plans. And specifically, the analysis to be  
23 undertaken was whether plaintiffs were improperly including  
24 amounts that were paid by the government as part of their  
25 damages, which the *In Re Namenda* case, as Your Honor may



1 recall, says should not be included. That requires accounting  
2 for a variety of different government subsidies and  
3 reimbursements. Some of these are addressed by data that the  
4 plaintiffs have already produced and some of them are not.

5 For example, a third-party payor's drug payment  
6 obligation may be lower or it may be zero during certain phases  
7 of Medicare coverage, like the catastrophic phase or the  
8 coverage gap phase, and you can identify those situations from  
9 the prescription drug event data, which to some degree MSPRC  
10 has produced. So there's some missing PDE data but they've  
11 produced some.

12 Likewise, the government pays a subsidy called the  
13 low-income subsidy for drug purchases for low-income  
14 beneficiaries. Those are also reflected in the PDE data. But  
15 there are other subsidies as well which are not reflected in  
16 the PDE data, and that's really what's at issue today.

17 For example, there is the CMS direct subsidy, which is  
18 a beneficiary-specific subsidy paid to offset the cost of drug  
19 treatments for specific conditions, like, relevant to this  
20 case, hypertension or primary pulmonary hypertension. And to  
21 disaggregate that subsidy and to allocate it to a specific drug  
22 purchase, you need the other reports that we're asking for.  
23 Those reports are the only reports that show the  
24 beneficiary-level data needed to disaggregate. They show the  
25 healthcare condition codes for these beneficiaries, the

1 diagnosis codes, the specific prescriptions. Using these data,  
2 our experts can determine what direct subsidy payments a TPP  
3 received to cover a given patient's individual drug costs and  
4 can even allocate them to be offset against specific valsartan  
5 costs. This is what plaintiffs argued at the October 27th  
6 hearing needed to be done to make the data useful and what they  
7 argued couldn't be done. Our experts disagree. They say it  
8 can be done, it just requires a lot of data, which is why nine  
9 of the requested reports and datasets on our list that haven't  
10 been produced provide the elements of these data.

11 Another example is the direct and indirect  
12 remuneration paid by CMS which includes all rebates, subsidies,  
13 and price concessions from any source that decreases the costs  
14 incurred by the Part D sponsor. The other two missing  
15 requested reports and datasets provide these elements of data.  
16 And if Your Honor wants, I can go through these reports one by  
17 one and discuss them, but I figure it's more helpful to provide  
18 you with a general description of what we need and what we  
19 haven't been given.

20 That's why we asked for these reports and datasets.  
21 It's not just the PDE data, which MSPRC has provided in part,  
22 and it's not just the aggregate totals, which are what are in  
23 the Excel spreadsheets they provided. Those aggregate totals  
24 don't tell us much unless we have the accompanying data needed  
25 to disaggregate.

1           And again, Your Honor, we were very transparent about  
2     needing these 14 reports and datasets in our motion to compel.  
3     We highlighted them repeatedly at oral argument. Your Honor  
4     was very patient with us. You gave us all every opportunity to  
5     say everything we wanted to say at that argument. MSPRC never  
6     contested the relevance of any of these reports or datasets,  
7     they never disputed they have them or could get them from their  
8     assignors, they never argued it would be burdensome to produce  
9     them. Their only arguments were that the subsidies aren't  
10    relevant and you can't disaggregate them. Your Honor rejected  
11    those argument and ordered the documents produced. You ordered  
12    them to produce the documents reflecting the subsidies,  
13    reimbursements, and rebates received from CMS during the time  
14    period for which MSPRC is seeking damages.

15           Essentially, plaintiffs' position seems to be that  
16    because you didn't cut and paste our list of the 14 specific  
17    reports and datasets, they only had to produce what they  
18    decided was relevant, which they thought was the PDE data and  
19    the aggregate spreadsheet. I don't think that's a reasonable  
20    interpretation of what Your Honor did. The 14 reports and  
21    datasets were perfectly clear in the motion, they were  
22    perfectly clear at argument. Your Honor could reasonably  
23    anticipate that the parties would act in good faith when you  
24    ordered the production of the documents reflecting subsidies,  
25    reimbursements, and rebates to include the 14 reports and

1 datasets that essentially everybody agreed were the ones at  
2 issue.

3 CMO 32 ordered MSPRC to complete its rolling  
4 production by May 3rd. And although MSPRC produced documents  
5 through the last day of that deadline, with respect to  
6 Your Honor's order, all they ever produced was a portion of the  
7 PDE data and the Excel spreadsheets that they've referenced in  
8 their letter.

9 So there's really three things we need here:

10 First, we need the 11 sets of reports and datasets  
11 that they have not produced at all for the entire time period.

12 Second, with respect to the PDE data, they have not  
13 produced the ConnectiCare PDE data, which is one of the  
14 assignors of MSPRC. And what they've said about that is that's  
15 not one of the two assignors at issue in the upcoming TPP  
16 trial, but that's not accurate. To be clear, Your Honor,  
17 ConnectiCare is a subsidiary of EmblemHealth. Plaintiffs'  
18 damages expert folded the ConnectiCare claims data into the  
19 EmblemHealth data and included it in her damages calculation.  
20 You can't have it both ways. If you're including ConnectiCare  
21 in your damages, you have to include the ConnectiCare reports  
22 and datasets in your production, and they haven't done that.

23 The third issue is they haven't produced the  
24 EmblemHealth data for 2014. What plaintiffs say about that is  
25 they don't have it. And it's possible -- we have discussed a

1 possible resolution of this one. We've asked for a  
2 certification and an explanation of why they don't have it when  
3 they had 2013 and 2015 to 2017. Plaintiffs are considering  
4 that. So we may have resolution of that one. I think it's  
5 fair to say we're at loggerheads on the other ones.

6 That's what we're asking you to order them to produce:  
7 The 11 missing reports and datasets for the full time period  
8 and the ConnectiCare data and to do something about the  
9 EmblemHealth data for 2014, either a certification and  
10 explanation or identifying and locating and giving us the data.

11 We also, respectfully, Your Honor, need more time.  
12 The reason we need more time --

13 JUDGE VANASKIE: All right.

14 MR. OSTFELD: I'm sorry?

15 JUDGE VANASKIE: Let me hear from Mr. Kass first with  
16 respect to the question of the documents that you're  
17 requesting, these 11 reports plus ConnectiCare.

18 MR. SLATER: Your Honor, it's Adam Slater. Now that I  
19 realize what we are talking about, I'm actually going to start  
20 the argument. Mr. Kass may need to supplement, but I'm going  
21 to begin. Okay?

22 The context is important because this basically  
23 duplicates the unauthorized motion that was just filed for  
24 sanctions, which I got the sense the defense was trying to  
25 create some sort of an impression that there was some sense of

1 urgency with this and there was something new or different.  
2 The motion, and I think it's part and parcel of this, that  
3 motion should be stricken. There was never a request for  
4 permission to file it.

5 The idea that a motion for sanctions under Rule 37 was  
6 filed over this issue is of great concern to us.

7 Getting into the substance of it, which we can come  
8 back to what I just said, the order was complied with. The  
9 initial request, the actual request, was for the plaintiffs to  
10 produce the data reflecting the subsidies, reimbursements, and  
11 rebates. Your Honor, we went back through the argument, we  
12 went back through your order, which was very, very specific and  
13 understandable, where Your Honor found that two categories of  
14 what was requested were not relevant and you didn't actually  
15 reach the burden and confidentiality issues. Your order was  
16 specific to produce the requested subsidy, reimbursement, and  
17 rebate data. That's what the order said; that's what was done.

18 What defense is now pointing to is in their motion  
19 they attempted to expand the discovery request and listed a  
20 whole bunch of other types of reports and now they're --

21 JUDGE VANASKIE: Hold on.

22 MR. SLATER: Loretta, you went off of mute, Loretta.

23 (Brief interruption.)

24 JUDGE VANASKIE: All right.

25 MR. SLATER: So, what happened was in their motion,

1 the defendants listed these other categories of reports. What  
2 counsel's not telling you is those reports that they are asking  
3 for, they include things like data as to the medical conditions  
4 of patients which Your Honor did not order to be produced and,  
5 in fact, Your Honor, again, your rationale for how you weighed  
6 the different arguments of the two sides, Your Honor said  
7 there's a potential relevance to what the TPP's paid and  
8 whether they got reimbursements. I can tell you certainly the  
9 plaintiffs, as you know, don't agree that that should be  
10 admissible, the reimbursements, and we don't believe that can  
11 be shown to a reasonable degree of certainty at trial, but  
12 Your Honor ordered it. You said, that's what I'm looking at,  
13 how are the damages going to be calculated. The defense has  
14 the right to the damages data in order to balance all this.  
15 And that was the subsidy, reimbursement, and rebate data.  
16 Again, that was produced.

17           So at the very first swipe, what the defense is doing  
18 is trying to enforce something that they dumped into their  
19 motion as additional requests beyond the original request which  
20 Your Honor did not order. Your Honor was specific, we produced  
21 what needed to be produced, and now, in essence, they're trying  
22 to bootstrap that into an argument, well, this was supposed to  
23 be produced before but, in essence, this is a new motion on  
24 issues that have never been in a formal discovery request and  
25 our major concern is that this is tied into an ultimate request

1 to delay everything because what you'll hear is their expert  
2 needs it, their expert needs to be able to put this in, they  
3 can't meet the deadlines, all the deadlines should be put out,  
4 and what MSP told Mr. Ostfeld is if there's something in  
5 particular you want to show us, we'd look at it, but there's  
6 nothing new.

7 As far as the points that Mr. Ostfeld listed, the 11  
8 sets of reports and datasets, I've addressed that. That wasn't  
9 part of your order and that wasn't something that was directed,  
10 that was something that was dumped into the motion but was not  
11 requested and Your Honor again was very specific on what to  
12 produce.

13 Number two, the ConnectiCare PDE data, they are  
14 correct that our expert referenced it and I believe in the meet  
15 and confer Mr. Ostfeld was asked, are you seeking to expand the  
16 trial to ConnectiCare, he said, no, I'm not. So the fact that  
17 our expert put it into the report, counsel can discuss this  
18 offline as to whether that could be addressed by simply a  
19 supplemental report or some other way to address it, but if the  
20 data is all going to be produced, you're essentially expanding  
21 the case into ConnectiCare also, which is not one of the  
22 assignors for trial.

23 The Emblem data, counsel is talking to the client to  
24 obtain a certification to address the 2014 data and that's  
25 being addressed.



1           So maybe the last two issues raise something that has  
2 to be discussed. All these other reports, that should be  
3 denied out of hand because the order was complied with. And I  
4 will leave Mr. Kass if there's something important that I left  
5 out.

6           MR. KASS: I think that's it for now.

7           JUDGE VANASKIE: All right, very well.

8           Mr. Ostfeld, how do I determine -- I guess your  
9 position is that the order that required the subsidy,  
10 reimbursement, rebate data to be produced necessarily  
11 incorporated the reports that were referenced in your motion.

12           MR. OSTFELD: That's exactly correct, Your Honor. And  
13 it's not something that we shoehorned into our motion or  
14 something we tried to slide in. I think we were really, really  
15 loud and explicit about this. What we requested was subsidy,  
16 reimbursement, and rebate data. In our report, we tried to be  
17 as specific as possible because in our multiple meets and  
18 confers with plaintiffs, what we kept hearing was, we don't  
19 know what you're asking for. So we got really specific: Here  
20 are the 14 reports and datasets that constitute the subsidy  
21 reimbursement, and rebate data. We put it in our motion. We  
22 argued it. It was one of the spotlights at the October 27th  
23 argument. We kept talking about those 14. We called them  
24 pre-baked reports. We talked about how it wasn't burdensome  
25 because these were pre-baked reports that went to CMS.

1           The arguments that Mr. Slater just made, if they  
2 really felt that way, could have been made at the October 27th  
3 hearing when Your Honor allowed all the argument we wanted.

4           When he refers to this data referring to the medical  
5 conditions of the patients, Your Honor, as I explained, that's  
6 what's needed to disaggregate the data, the subsidies are  
7 tied -- it's not -- these aren't like medical records of the  
8 patients; they're HCC codes, they're healthcare condition  
9 codes, they're diagnosis codes, they're prescription codes.  
10 They show what the beneficiaries were coded with and what was  
11 paid on behalf of the beneficiaries as a result of that. So if  
12 you want to disaggregate the CMS-direct subsidy, what you have  
13 to do is cross-reference the subsidy against the HCC codes, the  
14 diagnose codes, the prescription codes, then you can identify  
15 what was paid for each beneficiary for each of their medical  
16 conditions and that's how you disaggregate the data to  
17 determine what was paid that is attributable to the  
18 valsartan-containing drugs, what are the government payments  
19 that have to be offset against damages.

20           So I think that absolutely must be done, it's why this  
21 was in the original list of 14 reports. And we never heard a  
22 peep of disagreement about the reports or datasets until  
23 Your Honor granted the motion, then they decided to go back and  
24 decide for themselves what they were going to produce  
25 notwithstanding that Your Honor had the full benefit of our

1 description of what was to be produced when we argued this  
2 motion before. This is going back and rearguing the merits and  
3 it's why we contend and why we contend vigorously that they are  
4 in violation of this order and it's why we brought the motion.

5           The other point that I want to bring up, Your Honor,  
6 is ConnectiCare. What Mr. Slater said is that it was  
7 referenced in their expert's report. It wasn't referenced. It  
8 was incorporated into the damages calculation as part of the  
9 EmblemHealth damages claim.

10           We had proposed, with respect to the expert reports,  
11 that what should be done, now that we have a trial set, is  
12 plaintiffs should submit a new damages report that is  
13 particularized to the TPP trial. Plaintiffs oppose that. They  
14 said, you have a damages report that you can respond to, you  
15 should respond to it. Judge Kugler agreed with plaintiffs.  
16 That's fine. That's the report we have, that's the report we  
17 have to respond to, that means we have to respond to the  
18 EmblemHealth data and to the ConnectiCare data that is folded  
19 into the EmblemHealth data, which means plaintiffs need to  
20 produce it.

21           Lastly, Your Honor, on the timing point, this is  
22 really straightforward. Judge Kugler ordered MSPRC to produce  
23 its data and complete its rolling production by May 3rd. They  
24 have not produced everything Your Honor ordered produced and  
25 absolutely we need time to review the data. This isn't a

1 delayed tactic. This is a remedy for the fact --

2 JUDGE VANASKIE: Hold on. We are getting some  
3 interference.

4 MR. SLATER: Somebody's unmuted who is watching with a  
5 phone number, I think.

6 (Brief interruption.)

7 JUDGE VANASKIE: Thanks.

8 MR. OSTFELD: So just finishing up that point,  
9 Your Honor, what I have just described, the process of  
10 disaggregation, requires analyzing some voluminous reports  
11 going through a lot of data. The report -- the CMO 32  
12 contemplated five weeks for us, from May 3rd to June 7th, to  
13 review the data and to prepare our report. MSPRC has not  
14 produced the data; our experts have not had an opportunity to  
15 review it. We're simply seeking what's fair, which is adhering  
16 to the original timeframe contemplated by CMO 32 by giving us  
17 the 35 days after MSPRC completes its production for us to  
18 prepare our damages expert responses.

19 MR. SLATER: Your Honor, I could suggest that on the  
20 ConnectiCare issue what I think should happen is that we should  
21 be ordered to meet and confer on an expedited basis and get  
22 back to Your Honor within a couple of days. I would think this  
23 is something that can be worked out.

24 As far as the Emblem data, I told you we're working on  
25 getting the certification.

1           To come back to the merits, the defense request that  
2           they moved on asked for the data on the subsidies,  
3           reimbursements, and rebates in Excel format. That's what the  
4           request was. They got a lot more than that but that's what the  
5           request was.

6           The other requests that they "baked" into their -- to  
7           take Mr. Ostfeld's word -- into their motion were never  
8           requested. Your Honor never contemplated production of medical  
9           conditions and medical records. It was purely the numbers,  
10          what was paid and what was paid back.

11          And I have to come back to the motion again. That  
12          motion was filed without the Court's permission in violation of  
13          Local Rule 37.1. It came out of left field for them to file it  
14          without discussing it first and Your Honor authorizing it. It  
15          never should have been a motion for sanctions anyway. Even if  
16          the defense believes they're entitled to something, it should  
17          have been a motion to compel additional documents or discovery,  
18          not a motion for sanctions. So we ask that that motion be  
19          stricken as well.

20          Thank you.

21          JUDGE VANASKIE: Mr. Ostfeld, do you want to address  
22          the point made by Mr. Slater concerning the filing of the  
23          motion without authorization?

24          MR. OSTFELD: Your Honor, if we violated a local rule,  
25          then we can certainly go back and revisit that. What we filed

1 was not a motion for sanctions, it was a motion for order to  
2 show cause. We think it's an appropriate motion for order to  
3 show cause because we believe that they are in violation of  
4 Your Honor's order and we think that that is entirely clear  
5 that they are in violation of Your Honor's order. This isn't  
6 the motion to compel additional data; this is a motion to  
7 compel production of the data that Your Honor contemplated when  
8 you entered your order.

9 JUDGE VANASKIE: Can you read to me, or it might take  
10 me a minute or two to find, the actual request for production  
11 that I ordered production of? That didn't make much sense.  
12 But the actual --

13 MR. HONIK: Your Honor, it may be --

14 JUDGE VANASKIE: -- request for production.

15 MR. HONIK: Your Honor, this is Rubin Honik.

16 It may be enlightening for the Court to know, because  
17 I think there is -- I don't want to say something  
18 inappropriate, but the request the defense made of us is  
19 contained at docket entry 2167-1, which was a letter from the  
20 defense group asking us to put the reimbursement data on an  
21 Excel spreadsheet. That's what was the subject of argument  
22 before the Court, and we've complied with that completely.  
23 It's a fiction that these additional reports were somehow the  
24 specific subject of that initial request or even argument.  
25 This is, regrettably, an attempt on the defense's part to

1   enlargen the schedule and there's simply no basis to do that  
2   because MSP has complied completely by producing that rebate  
3   and reimbursement data in exactly the format they requested  
4   which can be found at docket entry 2167-1.

5           MR. OSTFELD: Your Honor, I'm going to read to you  
6   Request Number 2 as it was expressed in our motion to compel,  
7   which is what you ruled on.

8           JUDGE VANASKIE: All right.

9           MR. OSTFELD: "Request Number 2, Subsidy,  
10   Reimbursement, and Rebate Data: Data in Excel format and  
11   reports reflecting subsidies, reimbursements, and rebates that  
12   you received from CMS, Center for Medicare and Medicaid  
13   Services, including but not limited to prescription drug event  
14   reports and all PDE payment records reflecting reimbursements  
15   and payments for valsartan-containing drugs and other standard  
16   reports and data available through CMS which reflect payments  
17   made or received by you for any prescription drugs for insureds  
18   enrolled in your plans during the relevant time period, such as  
19   monthly membership summary reports, plan payment reports, and  
20   payment/interim plan payment records/reports."

21           That is the request that was in front of Your Honor.

22           What plaintiffs are referring to is there were earlier  
23   iterations of this request in letters that did not have the  
24   same level of detail. Through our meet-and-confer process with  
25   plaintiffs, they sought additional detail which we provided and

1 we moved on the request as I just read it to you.

2 MR. KASS: Your Honor --

3 MR. SLATER: Your Honor, it's Adam Slater. I think  
4 I'm going to read what Mr. Kass has.

5 What you were just read is what's in the motion. Your  
6 question was, what did the request actually say in September  
7 2022. It requested the first half of what was read, a subsidy,  
8 reimbursement, and rebate data. "TPP plaintiffs shall produce,  
9 in Excel format, data reflecting all subsidies, reimbursements,  
10 and rebates received by TPP plaintiffs from Center for Medicare  
11 and Medicaid Services ("CMS"), including but not limited to all  
12 prescription drug event (PDE) reports and all PDE payment  
13 records reflecting reimbursement requests and payments for  
14 valsartan drugs during the time period for which TPP plaintiff  
15 is seeking damages, the relevant time period."

16 What Mr. Ostfeld just read to you from the motion  
17 added on the language stating "and other standard reports and  
18 data available through CMS which reflect payments made or  
19 received by you for any prescription drugs for insureds  
20 enrolled in your plans during the relevant time period, such as  
21 monthly membership summary reports, planned payment reports,  
22 and payment/interim plan payment records/reports."

23 So, again, all that add-on was not in the request.  
24 It's not appropriate in your motion to expand your requests and  
25 then ask for something that was not in the original request.



1 And, frankly, Your Honor, you addressed this, as you said, as  
2 we all said, in detail, it was argued, and your order was very  
3 clear to produce what was requested. That's what we produced.

4 And we can answer more questions about what else they  
5 are asking for, but we don't agree that any of these other  
6 reports would provide any meaningful or substantial additional  
7 information anyway, and it would start to get into problems  
8 that you didn't address, like burden and redaction for  
9 confidentiality because some of these reports, for example,  
10 have bid information and that type of data can be elicited and  
11 also the medical information, which, again, Your Honor never  
12 addressed because it was never raised. So the focus was on  
13 what was paid and what may have been reimbursed. What they did  
14 was expand it in the motion, Your Honor didn't order it, and  
15 now they're trying to expand it again.

16 MR. KASS: Your Honor, if I could just mention one  
17 little thing just to kind of help complete the picture is that  
18 Mr. Slater mentioned what Your Honor had ordered, and if you  
19 look at Your Honor's order at docket entry 2249, it clearly  
20 states what are the discovery issues at issue, what are the  
21 disputes, what are the categories, and it starts here on the  
22 first page "the subsidy, reimbursement data." That is a direct  
23 quote from the original request, the letter that defendants  
24 submitted to the Court at 2167. So that additional part that  
25 defendants tacked on on their motion to compel, that was never

1 ordered by the Court. The Court stuck with the original  
2 request and MSP has produced the data that defendants requested  
3 in their original request.

4 MR. OSTFELD: Your Honor, you've heard from three  
5 plaintiffs' counsel. May I be heard on this issue?

6 JUDGE VANASKIE: You certainly may.

7 Mr. Ostfeld.

8 MR. OSTFELD: Thank you, Your Honor.

9 Your Honor, our view is it doesn't matter which  
10 iteration of the request you're looking at. When you're  
11 talking about subsidies, reimbursements, and rebates, you're  
12 talking about the 14 reports and datasets.

13 What happened, and what plaintiffs are leaving out, is  
14 there was a meet-and-confer process where they sought further  
15 clarification which we provided. Going back to the original  
16 letter and the original letter request and ignoring the  
17 subsequent revisions is not appropriate.

18 We placed in front of Your Honor the request that was  
19 at issue but it doesn't matter, you could strike the last half  
20 of that and simply keep the original language and we're still  
21 talking about the same reports and the same data.

22 And, again, Your Honor, there was perfect transparency  
23 on this. All of this was in our motion, all of this was  
24 referenced multiple times at the October 27th argument. There  
25 is no credible argument that there was confusion on plaintiffs'

1 part as to the documents we were seeking, the documents we were  
2 moving on, and what Your Honor meant when you ordered  
3 production of the documents reflecting subsidies,  
4 reimbursements, and rebates. It's these 14 reports and data.

5 I would like to hear an explanation from them as to  
6 how they propose we disaggregate the CMS-direct subsidy without  
7 the nine missing reports pertaining to that or how we  
8 disaggregate the direct and indirect remuneration number  
9 without the two missing reports on that. That is why all of  
10 these reports and datasets reflect subsidies, reimbursements,  
11 and rebates. They are all what are needed to perform the  
12 disaggregation that plaintiffs vociferously argued at the  
13 October 27th hearing is the only way to make this historical  
14 data meaningful.

15 MR. SLATER: You know, it's ironic, Judge, because  
16 it's literally in your order and it was addressed that we  
17 explained that what they were seeking was the aggregated data,  
18 and we explained that we didn't know what they could do with it  
19 on a substantial basis or what they would be able to do with it  
20 through their experts. And Your Honor said, you know what? I  
21 hear what you're saying. The defendants want the aggregated  
22 data so you ordered it, and we understood and we produced it  
23 because that's what was at issue, that's what was -- that was  
24 what was requested, and that's what was produced.

25 Now, the defense is looking again saying now we want

1 these other things which were not ordered. Again, I don't know  
2 why Mr. Ostfeld is laughing at me, I'm sorry if I am that  
3 funny, but the order literally says, "MSPRC shall produce the  
4 requested subsidy, rebate, and reimbursement data for the  
5 relevant time period."

6 I keep coming back to the fact that a number of these  
7 reports talk about the patients' medical conditions. That was  
8 not contemplated. I don't know where they come up with the  
9 idea that this is something Your Honor considered or discussed  
10 because it wasn't. It wasn't something that Your Honor ordered  
11 or was contemplating because you were focused on what was paid  
12 and what may have come back and -- and I'm going to leave it at  
13 that. If anyone wants to add to it, but that's really what's  
14 at issue here.

15 JUDGE VANASKIE: All right. Go ahead, I will give you  
16 the last word, Mr. Ostfeld.

17 MR. OSTFELD: Just for the record, Your Honor, I  
18 wasn't laughing at Mr. Slater. The phrase now I'm asking for  
19 hit me funny because we asked for it clearly in our motion.

20 JUDGE VANASKIE: Understood. Understood.

21 I think what I'm realizing is there was ambiguity in  
22 the order that required production. The order didn't reference  
23 14 separate reports or sets of reports that would be the  
24 universe of documents to show subsidy, reimbursement, and  
25 rebate data, and the proposed order that accompanied their

1 original motion to compel, Document Number 2178, simply refers  
2 to the documents being sought as subsidy, reimbursement, and  
3 rebate data.

4           It would have been helpful, I suppose, and we wouldn't  
5 be having this argument now, if it was clear that this was what  
6 had to be produced, these 14 sets of records. It may be that  
7 they need to be produced but I am going to have a hard time  
8 concluding that they were clearly incorporated in the order  
9 that required production of that type of data.

10           You can continue to pursue your motion. I'm not sure  
11 where we stand on that right now. I don't know if it's a  
12 motion for sanctions or a motion to issue a rule to show cause  
13 why sanctions should not be ordered. I will listen to this  
14 argument. I don't want to foreclose anybody, and this is  
15 obviously an important point, and it may be that you're  
16 entitled to those 14 reports, but I have a hard time  
17 concluding, based upon the arguments that have been presented  
18 to me and the fairly lengthy letter briefs that were submitted  
19 in connection with this conference today, that plaintiffs would  
20 be on notice that they had to produce those 14 reports.

21           It certainly would have been preferable to have  
22 specified what needed to be produced. Mr. Ostfeld, you can  
23 feel very strongly, and you do, and that's okay, that they had  
24 to know that that's what you were looking for, but I can't read  
25 the order or the documents as saying, from my perspective, that

1 they had to know and they disregarded the order.

2 Now, where does that leave us? I think you can get  
3 the documents, Mr. Ostfeld.

4 MR. OSTFELD: I care much more about the documents  
5 than the sanctions, Your Honor. If the documents are ordered  
6 produced, I will happily withdraw the motion for an order to  
7 show cause.

8 MR. SLATER: I think where it leaves us, Judge, is the  
9 motion is a request -- they can call it whatever they want --  
10 it says they are requesting sanctions under Rule 37, they filed  
11 it without authorization, it should be withdrawn. It's  
12 something that shouldn't have been done.

13 What I would suggest is this: If we're going to start  
14 to talk about those reports, and we're now going to go down  
15 that road, the issues Your Honor said you did not need to  
16 address of burden and confidentiality are now going to become  
17 very important issues, and it's now -- which is another reason  
18 why we believe what we did was appropriate, but we're now going  
19 to have to enter into a meet and confer on it, it's going to  
20 have to be presented to Your Honor at a conference, because  
21 it's not just a simple matter of just spitting those reports  
22 out, and it also contains, as we've talked about, medical  
23 information about subscribers, so there's a whole level of  
24 argument on that too. So it's going to have to be handled in  
25 an orderly way.

1           We believe the whole thing should be denied. If they  
2 want to talk to us, we'll certainly -- that would be  
3 Your Honor's expectation, if someone wants to talk, you talk to  
4 them. If we can reach a point where we say, okay, based on our  
5 discussion we can agree to give you the following in this  
6 format, in order to address our burden and confidentiality  
7 concerns and our relevance concerns, then maybe it can get  
8 worked out and we would be willing to try to get them some more  
9 information, but we're certainly not taking the position or  
10 accepting that we're going to be obligated to, if it becomes a  
11 disputed issue with Your Honor, because I think we have good  
12 arguments about why this shouldn't be produced, but we're  
13 willing to talk. We should talk on an expedited basis about  
14 this, we should talk through the documents, and then come back  
15 to Your Honor, I think, so that Your Honor can have a clear  
16 record, we can narrow the disputes, hopefully, and then  
17 whatever remains, Your Honor can then be presented with an  
18 orderly record in order to make a decision. I don't know any  
19 other reasonable way to approach this.

20           MR. OSTFELD: Your Honor, if I may, I don't fault Mr.  
21 Slater for not knowing this because he hasn't been part of  
22 these meet and confers, but Mr. Kass and I have conferred on  
23 this list specifically yesterday but on these requests I would  
24 guess about a dozen times. We've had a lot of meet and confers  
25 on this, we've discussed a lot of different compromised

1 proposals before Your Honor's order came down. I would  
2 respectfully submit, even if Your Honor feels that your  
3 previous order wasn't clear in ordering the production of the  
4 14 reports and datasets, the 14 reports and datasets were at  
5 issue when we were before Your Honor last time, and you can  
6 certainly clarify your order and order the production of the 14  
7 reports and datasets now.

8 Based on the meet and confer yesterday, Mr. Kass and I  
9 are at odds on this. We are at an impasse. We have not been  
10 able to resolve this issue.

11 The appropriate path forward is for Your Honor to  
12 order the production of the reports and datasets that are the  
13 subsidies, reimbursements, and rebates data for the reasons  
14 that I've described and they should be produced.

15 JUDGE VANASKIE: Mr. Kass.

16 MR. SLATER: Your Honor --

17 JUDGE VANASKIE: Let me hear from Mr. Kass.

18 MR. KASS: Your Honor, at a minimum, I'm going to  
19 speak towards the meet and confer and I'll have Mr. Slater  
20 handle the rest.

21 MR. SLATER: Slow down.

22 MR. KASS: Yeah, yeah. I will speak with respect to  
23 the meet and confer and I'll let Mr. Slater handle the rest.

24 Your Honor, we did have a meet-and-confer call  
25 yesterday. Unfortunately, it wasn't very productive because



1 defendants' position was, we get all these documents, the Court  
2 said we get all these documents, I will never accept anything  
3 other than all these documents. Right? So that's a different  
4 state than where we are now, where we have clarity from the  
5 Court that the Court didn't specifically order these documents;  
6 and with that clarity, it's possible that a subsequent  
7 meet-and-confer call would result in different results.

8 MR. SLATER: What I was going to say, Your Honor, is,  
9 I understand Mr. Ostfeld asking to just order it. That's  
10 great. I've probably said that many times also at some of  
11 these conferences, but the fact is, it implicates issues that  
12 Your Honor specifically said you were not addressing of burden,  
13 confidentiality, and you made specific relevancy findings in  
14 your order about what's relevant. In that *Namenda* case, you  
15 actually contrasted it in one context to another and found  
16 something is relevant in this context and not relevant in that  
17 context. So it's not so simple, and if they want to go down  
18 this road, we have to have the opportunity to go through the  
19 reports one at a time, we need to present our arguments, and  
20 what I'm saying is, we're probably in a position to produce  
21 more of this data, if we need to, if Your Honor wants us to,  
22 but it's something that has to be discussed and we need a  
23 global agreement on what we're going to produce and what we're  
24 not and what's in dispute. If we can't reach an agreement,  
25 then we'll come back before Your Honor but with an opportunity

1 to explain to you the burden and confidentiality and relevancy  
2 issues as to those 14 reports because, again, it's not --  
3 they're significant issues and Your Honor would need to  
4 consider those as opposed to just saying produce it all.

5 MR. OSTFELD: Your Honor, respectfully --

6 JUDGE VANASKIE: Yes, Mr. Ostfeld.

7 MR. OSTFELD: -- plaintiffs are trying to run out the  
8 clock here. We have a damages report due on June 7th. The  
9 process that Mr. Slater is describing will drag on for weeks.  
10 I know this because our previous processes have dragged on for  
11 weeks and in the meantime, our deadline will come and expire  
12 and our experts will have to disclose their reports without the  
13 data that we need and, respectfully, that I believe was within  
14 the scope of our prior motion to compel.

15 Your Honor's order did not cut and paste our listed 14  
16 reports and datasets. I certainly understand Your Honor's view  
17 that you do not feel that plaintiffs could discern from that  
18 that they were required to produce the 14 reports and datasets,  
19 but Your Honor did require production of the subsidies,  
20 reimbursements, and rebates data.

21 All of the arguments and concerns plaintiffs had  
22 regarding these reports and datasets, they had this in their  
23 hands in October of last year. They've had months to raise  
24 these issues and they haven't.

25 These reports should be produced so that our experts

1 can complete their work.

2 JUDGE VANASKIE: Mr. Ostfeld, I looked at the proposed  
3 order that accompanied the original motion to compel, which is  
4 at ECF Document 2178-5, and it wasn't specific as to 14 reports  
5 that would be the universe of documents. So there's some  
6 ambiguity here.

7 I am going to direct that you meet and confer on an  
8 expedited basis to see which of these reports will be produced  
9 by the plaintiffs. The plaintiffs will have an opportunity to  
10 address the burden and confidentiality issues that they have  
11 raised. I would like a letter report back from you all by  
12 Monday of next week, so that's May 22nd, and I'd like to  
13 schedule another conference call for later in the week -- I  
14 have to look at my calendar -- a conference call to try to get  
15 this resolved. It's not a very complicated issue, after all.  
16 But I do have to say that I don't think the order, with all due  
17 respect -- and I know you feel strongly about this. If the  
18 order had been presented to me and had cut and paste 14 issues,  
19 we wouldn't be here arguing. There's ambiguity, ambiguity in  
20 my order, and that's what happens when there's ambiguity. All  
21 right?

22 So I'll direct that you meet and confer, file a status  
23 report by close of business or end of the day, midnight, on --  
24 it's no longer midnight in the Third Circuit, by the way, you  
25 got to know that -- so that I get it by Monday, midnight, and

1 I'll look at my calendar and schedule a conference call for  
2 next week. All right?

3 MR. SLATER: Thank you, Judge.

4 And I just want to know, and I'm hoping Mr. Ostfeld  
5 can answer the question and avoid Your Honor having to rule on  
6 this, whether we have to move to strike their motion or whether  
7 they're going to voluntarily withdraw the motion at this point,  
8 since Your Honor is now addressing this issue. I would really  
9 much prefer not to have to take that procedural step of filing  
10 a motion to strike the sanctions motion. We are not  
11 comfortable with that sitting on the docket, I'm sure you can  
12 understand.

13 MR. OSTFELD: Your Honor, I'll just need to be able to  
14 confer with my colleagues. But we're going to have an  
15 expedited meet and confer. I would imagine by then I'll have  
16 an answer on that question.

17 JUDGE VANASKIE: That's fine.

18 MR. SLATER: That's acceptable to us, Your Honor.  
19 Thank you.

20 JUDGE VANASKIE: All right. All right. Well, that  
21 exhausted Item Number 3 of the agenda letter from plaintiffs.

22 Item Number 4 is Retailer Discovery. Is there  
23 anything that's ripe for me on retailer discovery?

24 MR. STANOCH: Good afternoon, Your Honor. David  
25 Stanoch for the plaintiffs. I'll address these issues.

1           Before I begin, I wasn't sure if you or the court  
2 reporter would want just a very brief break. That was a very  
3 long colloquy we just had.

4           JUDGE VANASKIE: That's a very nice suggestion. Let's  
5 give five minutes for Camille to stretch her fingers some more.

6           MR. STANOCH: Very good, Your Honor.

7           JUDGE VANASKIE: Five minutes.

8           (Brief recess taken from 5:14 p.m. until 5:20 p.m.)

9           MR. STANOCH: Yes, Your Honor, addressing the retailer  
10 discovery issues first. I think it may be correct that there's  
11 technically nothing specifically at issue for Your Honor to  
12 decide today, but as noted in our letter of May 15th, as well  
13 as our separate update letter to Your Honor of May 10th, we do  
14 have some timing concerns that appear to be arising.

15           CMO 32, it was very clear, specified four things that  
16 retail pharmacy defendants are supposed to produce. And all  
17 the parties have outlined that; there's no disagreement about  
18 the general categories.

19           Retailers' letter to Your Honor of May 10th suggests  
20 the parties continue to meet and confer and provide a "further  
21 update" on June 7th; and then their letter of the 15th with  
22 respect to only one category of the information ordered  
23 suggested another 60, 90-day deadline for them to produce it.  
24 We have some timing concerns with that.

25           CMO 32 is very clear that the three categories of data

1 were to be produced by May 30th and custodial discovery and  
2 deposition plan submitted May 31st, and we don't think that  
3 there's reason to delay, let alone to further confer, given the  
4 clarity of the items that are addressed and the parties'  
5 discussions to date, especially when the requests for  
6 additional time, which it's not even clear how much time  
7 they're asking for, what intermediate dates, if any, they're  
8 asking about and if it would apply to some or all of the  
9 categories, what's really the ask to Your Honor.

10 So we would just suggest that we stay the course with  
11 CMO Number 32, as Judge Kugler ordered, given those deadlines  
12 that were set and the clarity of the information ordered.

13 JUDGE VANASKIE: All right. Who's addressing this for  
14 the pharmacy defendants?

15 MS. KAPKE: Your Honor, Kara Kapke for the pharmacy  
16 defendants.

17 To hear this from Mr. Stanoch is disappointing, to say  
18 the least. I think their May 15th letter contains  
19 misrepresentations that have to be corrected.

20 The letter states that we did not address the ability  
21 to meet that May 30th deadline to provide the information  
22 necessary to effectuate notice, and that's just not true.  
23 Timing issues were in our April 24th letter, before the last  
24 status conference where we said that meeting a May 30th  
25 deadline was impossible and untenable. I stated in open court

1 before Judge Kugler multiple times saying there are logistical  
2 challenges with producing this data and I requested more time  
3 to comply with the May 30th deadline. I specifically stated in  
4 open court that we needed more time to gather and compile this  
5 data, and that includes identifiers for purposes of notice.

6 To quote Mr. Slater, it's not just a simple matter of  
7 spitting these reports out. It's very complicated to produce  
8 this, and we can't do it by May 30th. We can't. And it's not  
9 clear what we've actually been ordered to produce. I think the  
10 prior discussion is very illuminating because the four  
11 categories are not clear. We don't know what we're supposed to  
12 produce. We had told plaintiffs' counsel repeatedly in meet  
13 and confers, and even in our letter on May 10th, where we  
14 stated our production would be after the May 30th deadline. In  
15 all of our meet and confers, plaintiff has never objected to  
16 giving us the necessary time for production. So reading the  
17 letter stating that we did not address the ability to meet that  
18 May 30th deadline was, honestly, a bit shocking and very  
19 frustrating.

20 I want to start with the identifiers issue, though,  
21 because I feel like our letters talked past each other. And my  
22 colleague, Kristen Richer, can talk about some of the other  
23 issues but I want to provide an explanation of why this takes  
24 time.

25 CMO 32 ordered the pharmacy defendants to "unredact"

1 the previously produced dispensing data, but that's a bit of a  
2 misnomer because some of the pharmacy defendants simply cannot  
3 do what CMO 32 ordered, which is un-redact the dispensing data  
4 because many pharmacy defendants did not actually redact  
5 anything from the dispensing data.

6           There were multiple options for producing the  
7 dispensing data in the negotiated RFPs and redacting personal  
8 identifiers was just one of them. Some defendants anonymized  
9 the data, some defendants did not pull identifiers, such as  
10 mailing or email addresses. So in many cases the dispensing  
11 data with actual names, addresses and/or emails will need to be  
12 re-pulled. That takes time and we're certainly willing to  
13 produce it when it's ready but it logistically cannot be done  
14 in a matter of a few weeks.

15           But beyond the time of production, there's the issue  
16 of HIPAA. We have respectfully requested, and we've done this  
17 through every meet and confer and every letter to the Court,  
18 we've requested a HIPAA-compliant order when the Court  
19 specifically finds that this production of protected health  
20 information is necessary for purposes of the litigation. We  
21 sent a proposed order to plaintiff last Thursday, along with a  
22 request to meet and confer, and have not heard back from them  
23 at all in response to that email. So it's very frustrating for  
24 them to say in letters to you that everything must be done by  
25 May 30th and then let six days pass without responding to an



1 email from us where we proposed an order and where we requested  
2 a meet and confer.

3 But, in any event, HIPAA specifically requires that  
4 pharmacies, as covered entities under HIPAA, make reasonable  
5 efforts to limit protected health information to the minimum  
6 necessary to accomplish the intended purpose of the use  
7 disclosure request. That's 45 CFR 164.502(B). I don't think  
8 that's really in dispute here.

9 We certainly understand that plaintiffs may need to  
10 match the dispensing data to individuals for purposes of class  
11 administration to determine whether a person paid for  
12 valsartan, how much valsartan a person was dispensed, and other  
13 matters, and we have never contemplated not producing, in some  
14 form or fashion, identifiers with the dispensing data that we  
15 did produce. But now we have a problem with HIPAA because  
16 we're being told that the addresses are necessary for class  
17 notice. That's what's been in every request, every submission  
18 to the Court, but the Class Notice Plan doesn't include it in  
19 any way. There's no actual use of those addresses, email  
20 addresses or mailing addresses, in the Class Notice Plan. It  
21 relies exclusively on advertising or a media campaign.

22 So what are we supposed to do? Why do we need to  
23 produce addresses to the plaintiffs if they're not going to use  
24 them? And how is that compliant with HIPAA's mandate that we  
25 only produce the minimum necessary information to accomplish

1 the intended purpose of the disclosure?

2 At bottom, Your Honor, we understand we will need to  
3 produce identifiers and that will include protected health  
4 information. We're willing to do that but it's certainly very  
5 reasonable for us to have an understanding of exactly what  
6 we're being ordered to produce and only produce identifiers  
7 once. We don't want to have to go back to our clients a second  
8 time, a third time, to produce additional identifiers if  
9 plaintiffs need something different than addresses, and they  
10 don't need addresses, as I understand it right now, because  
11 they are not using addresses in any way. We don't want to  
12 produce addresses, which are protected health information and  
13 may include, for example, service member military addresses  
14 that are highly confidential, unless those addresses are the  
15 minimum necessary for the purposes of the litigation.

16 We understand there will be identifiers needed. It  
17 could be name and date of birth, we don't know though, but it  
18 does need to meet HIPAA.

19 And so we're seeking three things on the identifiers:  
20 Clarity from plaintiffs on what identifiers they actually need  
21 and plan to use and for what purpose, because what they have  
22 told us and represented to the Court that the addresses are  
23 needed for notice purposes is not at all reflected in their  
24 notice plan.

25 We need an order that contains the magic language

1 under HIPAA so that we ensure we are following the law and that  
2 our disclosure is the minimum necessary.

3 And then third, we need more time to actually pull the  
4 requested data once we know exactly what we're pulling and  
5 there's a HIPAA order in place.

6 So the thing that is specifically ripe today is that  
7 May 30th deadline can't -- we can't comply with that. We've  
8 said that for a month. And right now I don't know what I would  
9 go to my clients and request because I can't un-redact data.  
10 So I don't know what I would be requesting in response to CMO  
11 32's order.

12 So we need those three things: Clarity on what we're  
13 supposed to produce; an order that contains the magic HIPAA  
14 language; and then more time and relief from the May 30th  
15 deadline.

16 And my colleague Kristen Richer can talk about the  
17 other issues, but I wanted to start with the identifier.

18 JUDGE VANASKIE: Thank you.

19 MS. RICHER: Your Honor, would you like me to pause  
20 there so that you can deal with that --

21 JUDGE VANASKIE: Yes, let me go back to Mr. Stanoch  
22 and ask, first, is there any issue with respect to the HIPAA  
23 language that needs to be in the order?

24 MR. STANOCH: No, Your Honor. We'll figure it out.  
25 We've figured this type of thing out in this case before. It

1 will be a vanilla order. I'm sorry Ms. Kapke is frustrated.  
2 I'm frustrated that I have to provide clarity about what  
3 identifiers I need for notice plans when we've told her in her  
4 letters. So luckily we can say that that issue is moot both  
5 ways. We've told her before, we can tell her the exact fields  
6 we want, that we need it for notice and claims administration.  
7 We will double-check her order and let her know this week,  
8 that's fine.

9 I'm sorry, I argued before the New Mexico State  
10 Supreme Court today, I'm sorry I didn't get back to Ms. Kapke's  
11 email fast enough for her.

12 And what we need it for -- she's right, their Class  
13 Notice Program did not expressly reference the data, of course  
14 not. CMO 32 ordered us to file last week. They say they don't  
15 even have the data yet and don't know how quick they'll get it.  
16 How can we put in our notice plan last week what we're going to  
17 do with data we don't have yet. So I'm not faulting anyone,  
18 Judge. We're moving on parallel tracks under CMO 32. This is  
19 simply basic information for notice and claims administration  
20 verification for the economic loss class members. By the end  
21 of the week I'm happy to tell her again which identifiers and  
22 if we have it tweaked to her order, if not say it's acceptable  
23 and we can jointly submit it.

24 JUDGE VANASKIE: I know it's a little bit difficult  
25 given the uncertainty of exactly what is being requested, but

1 do you have an estimate of how much time you would need to  
2 produce the information?

3 MS. KAPKE: So I think there are some pharmacy  
4 defendants who can do it more quickly. In our proposed order,  
5 we put 90 days. I think we've asked all of the client pharmacy  
6 defendants if they could live with 60 and the response we got  
7 was "probably," but we'd like a little bit of a caveat that we  
8 could come back to the Court for more than that.

9 I certainly think that if we have it ready, we're not  
10 going to hold it back. As soon as it's ready, we can produce  
11 it.

12 I think there are some pharmacy defendants who can get  
13 it out somewhat quickly but others, it's going to be an  
14 entirely new pull once we know exactly what we're pulling.  
15 Others, it might be a crosswalk where we provide the anonymized  
16 number and then provide the information that goes with that  
17 anonymized number. That, actually, I think is going to be an  
18 easier pull than re-pulling all of the dispensing data. And so  
19 it really just depends on how the client's data is set up and  
20 also what data we're talking about. If we don't need mailing  
21 addresses and we're going to use date of birth or something  
22 like that, that's a different pull because a lot of the data  
23 didn't have mailing addresses in it on the first go.

24 So I think we could probably live with 60 days but we  
25 requested 90 because we didn't want to have to come back to the

1 Court if we ran into a problem.

2 This data often requires quality control checking, it  
3 often requires multiple pulls where you run -- it's not just  
4 spitting out a report. You have to write scripts to pull the  
5 data. It's pretty complicated.

6 JUDGE VANASKIE: Judge Kugler's order required  
7 production I guess by May 30th, and you say that cannot be  
8 accomplished.

9 What I would like to do is confer with Judge Kugler on  
10 what the deadlines should be. I will recommend that it be  
11 extended.

12 MS. KAPKE: Thank you, Your Honor.

13 MS. RICHER: Thank you, Your Honor.

14 Your Honor, I just want to highlight because I think  
15 part of the confusion and the timing under Judge Kugler's order  
16 is, like Ms. Kapke said, Judge Kugler seemed to contemplate  
17 that the plaintiffs already had all of this data, that some of  
18 it had just been redacted, but that's not the case with the way  
19 that the data was produced to them in the discovery. And so  
20 it's not simply a matter of removing redactions that are on  
21 spreadsheets. It's a matter of re-pulling what is, you know,  
22 millions and millions of fills of prescriptions for, you know,  
23 230 NDCs over about a ten-year period. It's a lot of data and  
24 to pull that is quite a tricky endeavor, for all the reasons  
25 Ms. Kapke noted.

1 JUDGE VANASKIE: Thank you.

2 MR. STANOCH: Your Honor, if I may, just because this  
3 dovetails with the Class Notice Plan and the argument  
4 Your Honor heard about an hour or so ago.

5 JUDGE VANASKIE: Go ahead.

6 MR. STANOCH: It may be that some of this could be  
7 reduced for the retailers if the defendants are not going to  
8 oppose a publication aspect of Class Notice Plan, in which case  
9 potentially, I'm saying that with a very big "P," potentially  
10 direct notice to the economic loss consumer class members are  
11 not necessary, but we can't be in a position where their side,  
12 not Ms. Richer or Ms. Kapke, but their side say, ah-ha, you say  
13 publication notice only, that's not the best form of notice,  
14 well, then, that's why we need this objective information on  
15 the consumers from the retailers because they know who got the  
16 actual scripts, who are the actual consumer class members.

17 JUDGE VANASKIE: Understood. Anything else on this  
18 issue? Anything else with respect to discovery from the  
19 retailer side?

20 MS. RICHER: Yes, Your Honor. I did just want to  
21 clarify, you know, plaintiffs' letter raised timing concerns  
22 with respect to the other categories of information that the  
23 Court had ordered us to produce and then the last end-of-month  
24 conference Judge Kugler ordered us to meet and confer with  
25 plaintiffs on. You know, we are again a little bit frustrated

1 with plaintiffs' comments that it's not clear whether we can  
2 produce this discovery by the end of the month. I think we've  
3 tried to be very clear with plaintiffs that we can't and that  
4 we're trying to meet and confer with them on this because for  
5 the reasons outlined in our letter submitted on the 10th and  
6 then previewed in our letter submitted on the 15th, these data  
7 points, again, are not static data points that are easy to  
8 pull, they are complicated to pull. I don't think those issues  
9 are ripe before the Court right now, Your Honor.

10 To address Mr. Stanoch's concerns about moving things  
11 along, you know, we've being been trying very hard to meet and  
12 confer with our clients and with each other and with plaintiffs  
13 to try and figure out what can be produced and in what format.  
14 I will tell the Court that we are working on a proposal right  
15 now to try to send to plaintiffs in the next few days. I think  
16 from our perspective what makes the most sense is for us to  
17 send that over, for us to meet and confer with plaintiffs, try  
18 to reach agreement on some of this stuff. I'm really hopeful  
19 that we can. Mr. Stanoch and I have a good record of  
20 navigating these issues when they're complex. If we can't, we  
21 can submit letter briefing to the Court, we proposed at the end  
22 of the month because that's the next time we'll be before  
23 Your Honor, and coming out of the Court's ruling on any  
24 disputes, if there are any, we'll have clear marching orders.

25 I think, there again, we'll probably need about 60



1 days to gather this data. A lot of it overlaps with the data  
2 that we're talking about with regard to the economic loss  
3 identifiers. You know, for example, Your Honor, what was paid  
4 to us for prescriptions, some of that ties to dispensing data  
5 to some extent.

6 So I think what makes sense is for us to present this  
7 stuff to you at the end of the month for you to tell us what to  
8 do on any disputes, and then we'd probably need about 60 days  
9 from the Court's ruling to pull the data and produce it to  
10 plaintiffs.

11 I think that's real progress, Your Honor. I don't  
12 think it meaningfully slows anything down that's on calendar in  
13 the immediate future in this case. And I think -- you know,  
14 I'm hopeful that we can get to a place where we negotiate this  
15 with plaintiffs, we get them the data they need, we can address  
16 some of our concerns about confidentiality and sensitive nature  
17 of this data, and we will get this stuff pulled and moving.

18 So that's what I would say about, you know, the cost  
19 and profit data and the TPP data.

20 And then on custodial discovery and depositions, I  
21 read in plaintiffs' letter for the first time that they're not  
22 okay with our proposal for the end of the year to target  
23 completing custodial discovery and depositions. You know, we  
24 thought that was a reasonable timeframe, factoring in where we  
25 are with this stuff, we don't have requests against us pending,

1 so negotiating custodian and producing documents in response to  
2 requests that haven't been served is a little bit tricky but we  
3 have a proposal for Mr. Stanoch that I'd like to float by him  
4 to address that as well. You know, I think we're due to come  
5 back to the Court at the end of the month on that issue with a  
6 proposed schedule or to have Judge Kugler tell us what he wants  
7 the schedule to be. So I am not sure that that's ripe, but I  
8 do think there is room to meet and confer on those issues  
9 further.

10 JUDGE VANASKIE: Mr. Stanoch?

11 MR. STANOCH: Your Honor, I'm happy to continue to  
12 meet and confer with Ms. Richer and her colleagues. We're  
13 happy to review her proposal. I think she's probably right  
14 that there is nothing ripe for Your Honor to do right now  
15 anymore other than for me to just note we're 13 days away from  
16 the CMO deadline for the production of all these other  
17 categories of data and you're hearing and I'm hearing they are  
18 going to give me a proposal later this week. So, they have  
19 certainly reached out to meet and confer and there is no issue  
20 with that; but it's just alarming to my side, generally, where  
21 we are, given the deadlines, but perhaps that's how we have to  
22 deal with it right now.

23 MR. SLATER: Can I add one thing, please?

24 MS. RICHER: Candidly, Your Honor, I -- Adam, I'd like  
25 to respond first.

1 MR. SLATER: Sure, of course.

2 MS. RICHER: So, you know, candidly, Your Honor, like  
3 Ms. Kapke said earlier, we've been very transparent I think  
4 with the Court and with plaintiffs that those deadlines were  
5 not workable for the pharmacy defendants. We've tried to be  
6 very -- you know, I think I've said now in multiple meet and  
7 confers with Mr. Stanoch when we decide what it is that we're  
8 pulling, we probably need about 60 days to produce it. So I  
9 don't think it should be a surprise to plaintiffs. We were  
10 surprised to read in the letter that they thought that the May  
11 30th deadline was the production date for these materials  
12 because, frankly, Your Honor, we thought we were past that.  
13 And we understood Judge Kugler, when he told us at the end of  
14 the last case management conference to meet and confer with  
15 plaintiffs about these issues and to come back to you,  
16 Your Honor, mid-month, to say that he understood that as well.  
17 You know, this is not us delaying for delay's sake. These are  
18 very complicated things that plaintiffs are asking us to pull.  
19 They are not necessarily static data points that exist the way  
20 that plaintiffs assumed, and we're talking about a lot of data  
21 in some of these cases. So I don't think it's unreasonable for  
22 us to need more time. I don't think we're really holding up  
23 anything else in the case by trying to have conversations with  
24 plaintiffs and trying to get this right in the first for  
25 instance. But it is the case that that end-of-month deadline

1 is not a workable deadline to us and we have tried to be as  
2 transparent about that as possible.

3 JUDGE VANASKIE: As I said, I will confer with Judge  
4 Kugler about that deadline.

5 Mr. Slater?

6 MR. SLATER: Thank you, Judge.

7 Admittedly, I haven't been in these meet and confers  
8 but I just wanted to throw out something because I would like  
9 to believe that the retailers are already collecting the  
10 databases, collecting the data. When I heard, after the order  
11 then we'll get to work on it, then we'll need 60 days, I would  
12 think that there may be certain categories or columns in  
13 spreadsheets or sections of data that may be an issue and they  
14 may not ultimately have to produce but I think that they should  
15 be collecting, pulling this together because they know there  
16 are certain things they're agreeing to produce to us, so I  
17 would think that that process should start and maybe that can  
18 have a significant impact on we need 60 days from the order.  
19 So I just wanted to put that out there.

20 And I'll ask my second question, so I don't have to  
21 ask them both, Mr. Stanoch raised a question, do the defendants  
22 believe that we don't need to provide direct notice with this  
23 Class Certification Notice Program, because that would make a  
24 big difference. We're obviously going to need this information  
25 later if we reach any resolutions because that's a different

1 level of notice if there's a settlement, but the question is  
2 whether or not the defendants take the position you don't need  
3 to give direct notice now, we're in agreement that publication  
4 notice is adequate. It gives them more breathing room on this  
5 information and it gives us a little bit of comfort in  
6 negotiating what we need to do because, obviously, if we do  
7 need to give direct notice, this issue has to be really, really  
8 focused on and we have to do everything we can to get this  
9 information as soon as possible because all we're doing with  
10 all these time frames we're pushing out is pushing out the  
11 potential trial date.

12 So I just wanted to make those points and ask for  
13 those answers.

14 JUDGE VANASKIE: I am concerned about that.  
15 Anything else?

16 MS. WHITELEY: Yes, Your Honor, this is Conlee  
17 Whiteley on behalf of plaintiffs.

18 So to go with Mr. Slater's point just a little bit  
19 further, Ms. Richer said that we're not holding up anything  
20 else in the case, and I see that Mr. Ostfeld came on for a  
21 minute and I'll anticipate that he's going to say, yes, we are  
22 because he is at an unfair advantage as we may be in a reply as  
23 to how to brief the point he made earlier as to the best notice  
24 practicable. So the practicable considerations have to do with  
25 whether they are going to be able to get us this information,

1 how complete it will be, and when, to make that analysis. And  
2 so the sooner we can get to the bottom of those issues, even if  
3 we don't have the actual data but when we'll get it and what it  
4 will consist of, then we will be able to address those issues  
5 more squarely before the Court.

6 JUDGE VANASKIE: Mr. Ostfeld?

7 MR. OSTFELD: Your Honor, obviously, I don't take a  
8 position on the request with respect to the pharmacies.

9 With respect to class notice, I don't think it's a  
10 matter of defendants agreeing or not agreeing as to whether  
11 individual notice is required. Rule 23(c)(2)(B) requires  
12 individual notice where the class members can reasonably be  
13 identified. So the question comes down to reasonable  
14 identification, and discovery issues are obviously part of when  
15 a class member can be reasonably identified. But even if we  
16 were to give that agreement, which I certainly can't do either  
17 for my own client or on behalf of the defense group, the Court  
18 has an independent obligation to ensure class notice to the  
19 class representatives and to the class members, excuse me.  
20 It's their due process right. So we can't simply waive away  
21 individual notice where it is reasonably practicable. It has  
22 to be done.

23 MS. RICHER: And just to clarify, Your Honor, with  
24 regard to the consumer economic loss, plaintiffs'  
25 identification and their addresses and their email addresses,

1 we're not refusing to produce that data and, in fact, we sent  
2 them a proposed order that contemplated the production of it  
3 and we've said we think we need about 60 to 90 days to produce  
4 this data. It's a lot of data to pull.

5           What then happened after we sent the notice over is we  
6 got their notice plan which didn't contemplate using that  
7 information at all. And so in this weird loop here where one  
8 hand isn't talking to the other, if plaintiffs think they want  
9 to send direct notice and they need this information to do it,  
10 we've said we would produce it. We have concern under HIPAA  
11 about producing it to them if they aren't using it for those  
12 purposes. That's the loop we're trying to close now.

13           On timely, I think, Ms. Whiteley, you know, I've said  
14 to Mr. Stanoch repeatedly, I think we would need 60 to 90 days  
15 to re-pull all of this data and produce it to you. It's a  
16 tremendous amount of data and it can be tricky to pull.

17           And to Mr. Slater's point, it is not the sort of thing  
18 where we can go collect names now and go back and collect  
19 dispensing dates later and go back and collect addresses after  
20 that. We're going to have to sweep archived information to  
21 pull this data, and doing that in pieces introduces a level of  
22 error that, one, is not particularly efficient; but two, could  
23 really affect whether the data comes back in a way that's  
24 problematic. So no, we're not collecting it piecemeal right  
25 now. We really need to know what the data pull looks like so

1 that we can instruct our clients and they can write the scripts  
2 and do what they need to do to go get the data. But we're  
3 happy to start that process as soon as we have clarity on this  
4 issue. We're really trying to get there.

5 JUDGE VANASKIE: All right. Thank you.

6 MS. RICHER: Thank you, Your Honor.

7 JUDGE VANASKIE: The last category is wholesaler  
8 discovery.

9 MR. STANOCH: Yes, Your Honor, David Stanoch again for  
10 the plaintiffs.

11 Again, I don't think there is really anything  
12 specifically ripe, Your Honor. I think, again, as with the  
13 retailers, CMO 32 was quite clear as to what was being ordered  
14 produced or due from the wholesaler defendants. Those are the  
15 same deadlines of May 30 and 31 that we just discussed with the  
16 retailers.

17 One aspect of one bullet of that data wholesalers have  
18 committed to producing by May 30th. We flag in our letter some  
19 concerns we have about that data but, you know, we may have to  
20 just wait to get it before we see what happens next. But  
21 beyond that, I think it's simply a timing issue again in terms  
22 of we appreciate this involves work. I think both sides talked  
23 about that in person in Camden last month, but we've yet to  
24 hear a concrete proposal in terms of what are we going to be  
25 getting and when.



1           And further, some other just concerns we note  
2 generally in the wholesalers saying they need to have their  
3 retained experts do analysis of profits and costs, that gives  
4 us pause, Judge, because even if they don't have the data  
5 specific for the profit and costs for valsartan like we talked  
6 about last month, our position of course is we're entitled to  
7 the ordinary course documents and data next best, not what a  
8 litigation-hired expert comes up with. They can certainly  
9 present that later maybe and make the argument to say, based on  
10 our data, you say it's X, we say it's Y, that's fine, that's a  
11 merits issue down the road; we're talking about getting the  
12 information. And even if it's not the exact number, as we  
13 talked about before, I won't belabor it, there will certainly  
14 be something close enough that we can use to a reasonable  
15 certainty with our experts.

16           And then the only other issue, the wholesalers are  
17 still pushing for supplemental discovery requests to be served  
18 on MSP and MADA. They say they've been pared down. I'll just  
19 say we can agree to disagree with that. They're still  
20 requesting medical records, still requesting -- now it's called  
21 unclean hands -- for TPP profits. But these aren't companies  
22 that take possession and resell the product. There is no  
23 unclean hands defense. It's all the same issues we talked  
24 about last month. Rather than get into requests that are still  
25 being arguably negotiated and which were not ordered by CMO 32,

1 let's defer what wholesalers might want to serve on the named  
2 TPP plaintiffs, let's get to the bottom and complete what CMO  
3 32 actually ordered the wholesalers to produce, and then we can  
4 revisit the issue.

5 JUDGE VANASKIE: All right. Who's addressing  
6 questions raised here on the behalf of the wholesaler  
7 defendants?

8 MR. GEOPPINGER: Good afternoon, Your Honor. Jeff  
9 Geoppinger on behalf of the wholesaler defendants, and my  
10 colleagues on with me will chime in I'm sure if needed.

11 Your Honor, I'll take the -- I guess I'll start with  
12 the first point Mr. Stanoch addressed, which is CMO 32.  
13 There's three bullet points on three things that the Court  
14 ordered us to produce under 7.1. I think as we discussed last  
15 on April 26, we're going to produce documents which I believe  
16 respond to 7.1.2 and 7.1.3 by the end of the month. If there's  
17 any issue, we'll raise it. But we're working towards that and  
18 expect to have that done, I should say data on those points.

19 7.1.1 is the profits issue. Again, I discussed it --  
20 Mr. Stanoch and I discussed with Judge Kugler. This is  
21 information that the wholesalers do not keep in the ordinary  
22 course of their business. This is not something that's new  
23 information for anybody in this litigation. In 2020 we  
24 submitted I think eight briefs on the issue. We had an hour  
25 and a half argument with Judge Schneider on the issue. Judge

1 Schneider issued an order that addressed some requests for  
2 production on this issue. He actually denied those requests  
3 for production. He also, in his order, raised issues about the  
4 scope of those requests and also the relevance of them, which  
5 we anticipated would have been addressed later on at some point  
6 with the Court, if and when the requests were served. That did  
7 not happen. Instead, we got CMO 32 and we're working to deal  
8 with it, Your Honor.

9 We've met and conferred with Mr. Stanoch. We talked  
10 about a proxy, a term he mentioned at this conference, and that  
11 we, you know, are attempting to embrace and figure out how can  
12 we go about coming up with a proxy. It is a process,  
13 Your Honor. We are not dragging our feet, I assure you. It is  
14 going to take time. It is going to be difficult. It's going  
15 to require hard work and if there's any question about that,  
16 the declarations submitted in 2020 with our briefing lay all of  
17 that out.

18 So we're looking for something, we're looking for an  
19 answer. We've asked and I thought, maybe Mr. Stanoch can tell  
20 me we agree, that we're on the same page at least that we're  
21 going to work towards that and we're going to try to figure  
22 this out, and we're going to try to come up with one by I guess  
23 a date certain at some point. It's not going to be May 31st.  
24 We cannot get this complicated issue done by May 31st. And,  
25 yes, it will probably include experts looking at the

1 information and trying to find out a way to find out or proxy  
2 profits for VCDs as the order requires. But we've met and  
3 conferred and we're going to continue to do so and we'll  
4 continue to keep the Court up to date with where we are at on  
5 that issue. As to the profits for VCDs, as I explained on  
6 April 26, that is not ordinary course data that we have.

7           On the discovery issue, Your Honor, we submitted a  
8 letter on May 10th and the letter on May 10th, Your Honor, I  
9 would submit, lays out the core relevance of what it is that we  
10 are looking for. It's very simple, Your Honor. We are looking  
11 for discovery of the TPPs on the elements of their claim of  
12 unjust enrichment. That's what we need. The elements are the  
13 plaintiffs' burden to prove, not ours, and we don't think the  
14 TPPs at this point should be able to ask for a bunch of  
15 discovery from us and say, but let's just hold off on doing any  
16 discovery with respect to the elements of the claims as to the  
17 TPPs.

18           So we proposed discovery to Mr. Stanoch. We've had  
19 meet and confers about it. We tried to pare it back. We can  
20 agree to disagree whether our efforts were successful in that  
21 regard. But, in any event, I think, Your Honor, the path  
22 forward on that discovery is to do what we did before with  
23 respect to the discovery that we dealt with early on in the  
24 case, which is to set a schedule for the parties to basically  
25 take the time to meet and confer and then submit briefing on

1 whatever they can't agree to for you to decide what is and what  
2 is not permissible in that respect.

3 JUDGE VANASKIE: Are you at the point now where you  
4 can identify the issues that need to be briefed so we can set a  
5 briefing schedule or do we have to give you some more time to  
6 meet and confer before doing that?

7 MS. DAVIS: Your Honor, D'Lesli Davis for Defendant  
8 Wholesaler McKesson.

9 In conjunction with the meet and confers related to  
10 CMO 32 -- and, by the way, we had briefed to the Court in one  
11 of the letters that we needed to do this basic core discovery  
12 on the unjust enrichment elements, and that kind of just got  
13 skipped over when addressed in CMO 32. But in our  
14 communications and our back and forth on that, we have, from  
15 the state, raised the discovery that we need from the  
16 plaintiffs and what we've heard, as you heard in open court,  
17 was that it's the most harassing discovery that Mr. Slater has  
18 ever seen and it should be stricken immediately. We have heard  
19 that it is too voluminous, it is enormously burdensome, and it  
20 is designed to harass. And so we carved it back and added  
21 categories that were in the May 10th letter to Your Honor to  
22 describe the relevance of the categories of documents being  
23 sought and the topics of discovery being sought, and what we've  
24 gotten every time is just no. And even the objections are  
25 conclusory. There's been no point at which the plaintiffs have

1 just said, you're wrong about relevance; you're wrong about  
2 thinking this is an element; you're wrong about whether we have  
3 a burden on this. Your Honor, I would suggest that there is a  
4 reason for the no, no, no, and the histrionics. I think the  
5 plaintiffs don't have this information and I think that the  
6 plaintiffs don't want to be forced to admit that they don't  
7 have it because they know they have the burden on these issues.  
8 But at core, the defendant wholesalers have got to be able to  
9 know what the plaintiffs have or do not have, and I'll give you  
10 an example, that links a particular wholesaler as the seller of  
11 a VCD on a particular transaction. If McKesson didn't sell the  
12 drug on this particular claim, and I mean the claim that's  
13 being covered by the insurance company or the TPP, then  
14 McKesson could not be unjustly enriched by this.

15           The plaintiffs have promised at the motion to dismiss  
16 stage, at the motion for leave to amend their pleading stage,  
17 that this is all something that they're going to get to in  
18 discovery, it's not time yet to talk about proximate cause of  
19 their burdens.

20           So I would suggest, Your Honor -- I know you just  
21 asked about scheduling -- I would suggest that unless the  
22 plaintiffs represent that they're willing to talk about this  
23 substantively, which we're happy to do, we're at the stage  
24 where we just need to enter a scheduling order on briefing.

25           JUDGE VANASKIE: All right.

1 MR. STANOCH: Your Honor, if the wholesalers only  
2 wanted the one thing or two things, perhaps that would be a  
3 room for compromise. We attached to our letter the  
4 "pared-down" requests. It speaks for itself. They want  
5 everything about TPP's profits, they want medical records for  
6 insureds, they want every communication about MSP's assignments  
7 from its -- every communication. The assignments were  
8 produced. They want every communication about the assignments  
9 and I can go on and on.

10 I think Your Honor's right. Give us one more chance  
11 to talk and then we can have a schedule perhaps and then go  
12 from there.

13 MS. DAVIS: That's agreeable, Your Honor.

14 JUDGE VANASKIE: All right. Well, what I will direct  
15 then is that -- how soon can you complete your meet and confer?  
16 I'm not very optimistic but maybe you will at least narrow the  
17 issues a bit. How much time do you need?

18 MS. DAVIS: Mr. Stanoch, do you believe we can get it  
19 done in a week?

20 MR. STANOCH: Potentially a week or two. I know folks  
21 were asking -- not you, Ms. Davis, but other folks on your  
22 side -- about the upcoming Memorial holiday. So however --

23 MS. DAVIS: Let's shoot for a week and we will give a  
24 report to Your Honor about where we are at at the week if we  
25 need additional time.

1 JUDGE VANASKIE: Okay. You have a week from today.  
2 So you have until the 24th. Then I will receive that report  
3 and I will issue a briefing schedule so that we can get the  
4 matters that remain in dispute on an agenda to be resolved --  
5 on a schedule to be resolved. All right?

6 MR. STANOCH: Thank you, Your Honor.

7 MR. GEOPPINGER: Thank you, Your Honor.

8 JUDGE VANASKIE: All right. Is there anything else?

9 MR. SLATER: Yes, Your Honor. One issue that is --

10 JUDGE VANASKIE: I shouldn't have asked that question,  
11 Mr. Slater.

12 MR. SLATER: You are going to like this issue. We  
13 just need your blessing. We asked the defense for an extension  
14 to serve our irbesartan and losartan discovery from today to  
15 Monday. They've agreed. So we just wanted to ask the Court if  
16 that's acceptable, and if you want us to send an order in, we  
17 can certainly do that, or a letter to so order, however you  
18 want to handle it.

19 JUDGE VANASKIE: That is acceptable and that is an  
20 easy one. I will ask you to send a proposed order to me.

21 MR. SLATER: Will do. You will have it tomorrow,  
22 Judge.

23 JUDGE VANASKIE: Thank you.

24 MR. OSTFELD: Your Honor, I just had one  
25 clarification. I think I said earlier that our informal



1 interview with the class administrator was next Tuesday. It's  
2 actually next Monday. My apologies for misidentifying the  
3 date.

4 JUDGE VANASKIE: Okay. Thank you.

5 MR. HONIK: Your Honor, in an abundance of caution,  
6 and I hate to tax anyone's time here, I don't think this point  
7 is lost on the Court, and I mention it only now for emphasis or  
8 clarity because I know Your Honor will be speaking to Judge  
9 Kugler.

10 Judge Kugler is poised to evaluate our notice plan,  
11 and that notice plan has a lot of moving parts. There's the  
12 economic loss or consumer part, there's the TPP part, which is  
13 implicated by a trial that's on the schedule, and one of the  
14 things that needs to be briefed and addressed to the Court is  
15 the practicability of notice and whether it needs to be down to  
16 the consumer level. And we have an unfortunate chicken-and-egg  
17 proposition here in that the defendants are unwilling to  
18 concede that publication notice may be adequate, we will put  
19 that aside substantively, but at the same time, we don't have  
20 retailer data, we don't know what it's going to look like or  
21 when we're going to have it, to be able to inform the Court  
22 whether that's the most practicable way to provide notice to  
23 the consumer class.

24 So there needs to be some thought -- there is a way  
25 out of this, but as Your Honor speaks to Judge Kugler about the

1 schedule and its implications here, I just want to make the  
2 record clear and sensitize Your Honor to the fact that it is a  
3 chicken-and-egg proposition here.

4 JUDGE VANASKIE: All right. I know how important that  
5 issue is, and certainly we are all sensitive to the command of  
6 due process that you use the method that is most likely, given  
7 the complexities, to provide information to class members. I  
8 understand the dilemma you are in where you've got to address  
9 the question of what kind of notice should be provided when you  
10 don't have all the information. But this is a very complicated  
11 matter and the class size is huge.

12 And so I will certainly keep that in mind when I have  
13 a discussion with Judge Kugler and we will try to keep this  
14 matter moving. I know what he wants to do is keep it moving,  
15 moving, moving.

16 MR. HONIK: Yes, Judge. And we may be able to adhere  
17 to that by staggering this. We may be able to separate out the  
18 TPP-related notice from the consumer notice. I just --

19 JUDGE VANASKIE: Right.

20 MR. HONIK: I put that out there for your  
21 consideration.

22 JUDGE VANASKIE: Okay. Thank you. All right. Now,  
23 at the risk of --

24 MR. SLATER: Don't do it, Judge. Don't do it.

25 JUDGE VANASKIE: Is there anything else?

1 MR. SLATER: Nothing for plaintiffs.

2 JUDGE VANASKIE: Camille, thank you so much. You are  
3 an iron woman to stay this long and get this done.

4 Thank you all very much and we'll be talking to you.

5 MR. HONIK: Thank you, Judge. Thank you, Camille.

6 MR. SLATER: Thank you, Your Honor.

7 MS. KAPKE: Thank you, Your Honor.

8 MS. WHITELEY: Thank you, Your Honor.

9 JUDGE VANASKIE: Thanks.

10 (The proceedings concluded at 6:03 p.m.)

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12 FEDERAL OFFICIAL COURT REPORTER'S CERTIFICATE

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15 I certify that the foregoing is a correct transcript  
16 from the record of proceedings in the above-entitled matter.

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18 /S/ Camille Pedano, CCR, RMR, CRR, CRC, RPR  
19 Court Reporter/Transcriber

5/18/2023  
Date

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